

COURT OF APPEAL FOR ONTARIO

BETWEEN:

JOANNE ST. LEWIS

Plaintiff
(Respondent)

—and—

DENIS RANCOURT

Defendant
(Moving Party)

—and—

UNIVERSITY OF OTTAWA

Rule 37 Affected Party
(Respondent)

**FACTUM AND AUTHORITIES
OF THE RESPONDENT, UNIVERSITY OF OTTAWA
[Rancourt's Motion for Leave to Appeal]**

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**FACTUM OF THE RESPONDENT,
UNIVERSITY OF OTTAWA**

**PART I – STATEMENT OF FACTS WHICH THE UNIVERSITY
ACCEPTS AND DISAGREES, AND ADDITIONAL FACTS**

A. Overview

1. The Moving Party, Denis Rancourt (“Mr. Rancourt”), seeks leave to appeal from the Order of Justice R. Smith in respect of costs to be paid by him (the “Costs Order”) as a result of the dismissal of his champerty and maintenance motion (the “Champerty Motion”).
2. After the Champerty Motion, Smith J. awarded costs to the University of Ottawa (the “University”) in the amount of \$47,200 and to Joanne St. Lewis (the “Plaintiff”) in the amount of \$58,500, on the basis that: the University and Plaintiff were completely successful in defending the Champerty Motion; the matter was of high importance and was made very

factually complex due to the extensive materials and allegations made by Mr. Rancourt; there was nothing preventing the Court from awarding costs in favour of the University and Plaintiff; the hourly rate and time spent by the University and Plaintiff were proportional to the complexity of the matter; Mr. Rancourt should have expected to pay a significant amount of costs if he was unsuccessful in the Champerty Motion; Mr. Rancourt did not prove his impecuniosity; and, there was no reason to defer the awarding of costs.

3. Smith J.'s factual conclusions all have a sound basis in the evidence. His analysis of the law was correct, and his determination of issues of mixed fact and law does not contain a palpable and overriding error. This Court should not grant Mr. Rancourt leave to appeal the Costs Order.

B. The Defamation Action and Mr. Rancourt's Champerty Motion

4. The Plaintiff, an African-Canadian woman and a professor at the University's Faculty of Law, sued Mr. Rancourt, a former professor of physics at the University before his 2009 dismissal, for defamation as a result of Mr. Rancourt publishing on his internet blog comments in which he referred to the Plaintiff as "Allan Rock's house negro". Mr. Rock is the President of the University. That defamatory publication followed the Plaintiff's preparation of a report requested by the University on the issue of whether there was "systemic racism" within the University's student appeal process.

St. Lewis v. Rancourt, 2013 ONSC 6118, (hereinafter referred to as the "Costs Decision of Smith J."), para. 1; [Tab 1]

5. During the course of the litigation, Mr. Rancourt learned that the University had agreed to fund the Plaintiff's libel action. He moved to have the libel action dismissed as an abuse of process on the basis that it is the product of maintenance and champerty. On

December 13, 2012, the Champerty Motion was heard, and on March 13, 2013, Smith J. issued his reasons dismissing the motion.

St. Lewis v. Rancourt (hereinafter referred to as “Reasons from Champerty Motion Decision”), 2013 ONSC 1564; [Tab 2]

6. After Smith J. released his decision, the parties were invited to submit their positions as to costs. On October 4, 2013, Smith J. released his Cost Decision on Mr. Rancourt’s Champerty Motion (“Cost Decision”). He awarded the University costs in the amount of \$47,200 and awarded the Plaintiff costs in the amount of \$58,500.

Costs Decision of Smith J., para. 38; [Tab 1]

7. On November 8, 2013, this Court heard Mr. Rancourt’s appeal from Smith J.’s Champerty Motion decision and dismissed it from the bench, without needing to hear oral submissions from the University or Plaintiff.

St. Lewis v. Rancourt (hereinafter referred to as “Court of Appeal Reasons on Champerty Motion Appeal and Costs”), 2013 ONCA 701; [Tab 3]

8. On November 13, 2013, this Court issued its endorsement in the Champerty Motion appeal, awarding costs in the amount of \$20,000 the Plaintiff, and costs in the amount of \$15,000 to the University. A copy of Smith J.’s Costs Decision was provided to the Court after the appeal was dismissed and before it retired briefly to consider the issue of costs.

Court of Appeal Reasons on Champerty Motion Appeal and Costs; [Tab 3]

C. The Instant Motion for Leave

9. Mr. Rancourt brings the within motion for leave to appeal Smith J.’s Costs Order on the following bases:

- (a) the costs award is contrary to policy principles governing costs;

- (b) the funding agreement between the University and the Plaintiff raises the prospect of double recovery;
- (c) the costs award is contrary to *Charter* considerations on costs in the defamation action;
- (d) the Defendant, Denis Rancourt, is impecunious;
- (e) the amount awarded by Smith J. is unfair and unreasonable;
- (f) the University is not entitled to costs; and
- (g) Smith J. was wrong to award costs for attendance at case conferences.

10. Mr. Rancourt's submissions in the current leave to appeal motion are simply a re-statement of his original submissions to Smith J. and are a re-argument of many of the issues already decided by the Superior Court of Justice, the Court of Appeal for Ontario, and the Supreme Court of Canada in this action. There is no merit to any of Mr. Rancourt's arguments and leave should not be granted.

PART II – UNIVERSITY'S POSITION WITH RESPECT TO ISSUES RAISED

A. Mr. Rancourt Requires Leave to Appeal the Costs Decision

11. Mr. Rancourt requires leave of this Court to appeal the Costs Order that was granted in the Superior Court's discretion in the Champerty Motion.

Courts of Justice Act, RSO 1993, c. C.43, s.133

B. The Test for Leave Requires Strong Grounds that the Lower Court Erred and Leave Should only be Granted Sparingly and only in the Most Obvious of Cases

12. The test for granting leave to appeal a costs order requires the moving party to show that there are strong grounds that the lower court erred. Leave should be granted only sparingly and only in the most obvious of cases.

McNaughton Automotive Ltd. v. Co-Operators General Insurance Co., 2008 ONCA 597 at paras. 24 and 25; [Tab 4]

13. Mr. Rancourt has failed to show that there are strong grounds upon which this Court could find that Smith J. erred in exercising his discretion to award the University costs.

C. The Costs Award is Consistent with the Principles Governing Costs

14. The costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid.

Courts of Justice Act, RSO 1993, c. C.43, s.131

15. In exercising its discretion to award costs, the Court may consider:

- (a) the principles of indemnity, including the experience of the lawyer entitled to these costs as well as the rates charged and hours spent by that lawyer;
- (b) the amount of costs an unsuccessful party could reasonably expect to pay;
- (c) the complexity of the proceedings and importance of the issues;
- (d) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceedings; and

- (e) any other matter relevant to the question of costs.

Rules of Civil Procedure, Rule 57.01(1)

16. Smith J. considered all of these factors in his reasons to award costs and there is no basis upon which to review his decision.

Reasons from Champerty Motion Decision, at para. 5; [Tab 2]

D. The Agreement between with University and Plaintiff is entirely Appropriate and in No Way Precludes a Costs Award

17. Smith J. held that the University's agreement to fund the Plaintiff's legal costs to commence the libel action against Mr. Rancourt was not champertous and did not constitute maintenance because the alleged libel occurred during the course of her employment for the University.

Reasons from Champerty Motion Decision, at paras. 93, 97 and 104; [Tab 2]

Costs Decision of Smith J., at para. 6; [Tab 1]

18. The Court of Appeal agreed with Smith J. entirely, holding that his underlying findings of fact were reasonably supported by the record and in contrast, holding that none of the several grounds advanced by Mr. Rancourt had merit.

Court of Appeal Reasons on Champerty Motion Appeal and Costs, para. 1; [Tab 3]

19. The fact that the University is paying for the Plaintiff's costs is not a valid reason for refusing to award costs to a successful party.

Hill v. The Church of Scientology in Toronto, [1995] 2 SCR 1130; [Tab 5]

Costs Decision of Smith J., at paras. 15 and 16; [Tab 2]

St. Lewis v. Rancourt, 2012 ONSC 3320 at para. 10; [Tab 6]

St. Lewis v. Rancourt, 2012 ONSC 5998 at para. 24; [Tab 7]

20. Smith J. made no error in reaching his conclusion that the University is entitled to costs and, therefore, there is no strong ground on which his decision should be overturned.

E. Mr. Rancourt's *Charter* Argument Was Considered and Properly Rejected

21. Mr. Rancourt argues that because this case concerns a defamation action, it attracts the *Charter* right of free expression and that special considerations ought to be granted with respect to the inequality of resources, use of public funds, the absolute privilege to criticize government and policy considerations surrounding SLAPP suits. This issue was not raised before Smith J. in Mr. Rancourt's costs submissions.

Rancourt's Costs Submissions to Smith J.; [Rancourt's Motion Record, Tab 13]

22. Rather, Mr. Rancourt made his *Charter* arguments to Justice Smith during the Champerty Motion. In his Champerty Motion decision, Smith J. considered *Hill v. Church of Scientology of Toronto* in which the Supreme Court of Canada rejected the argument that that libel action represented an effort by a government department to use the action of defamation to restrict and infringe the freedom of expression of the appellants in a manner that is contrary to the *Charter*.

**Rancourt's Factum re Champerty Motion – Superior Court, paras. 47-52,
(Responding Motion Record of the Respondent, University of Ottawa, Tab 1, pp. 11-12.**

Reasons from Champerty Motion Decision, at para. 89; [Tab 2]

Hill v. The Church of Scientology in Toronto, supra; [Tab 5]

23. Having considered Mr. Rancourt's argument and the relevant case law, Smith J. found that Mr. Rancourt's *Charter* argument had no legal, evidentiary or logical basis for support.

Reasons from Champerty Motion Decision, at paras. 90-93; [Tab 2]

24. Mr. Rancourt reargued his *Charter* position at the Court of Appeal in his appeal of the Champerty Motion decision. This Court found Mr. Rancourt's position was without merit.

This is the third time Mr. Rancourt makes the same *Charter* argument in respect of the same motion, and there is no reason why it ought to succeed this time.

Rancourt's Factum re Champerty Motion Appeal (C56905) at para. 77, (*Responding Motion Record of the Respondent, University of Ottawa*, Tab 2, p. 50.

Court of Appeal Reasons on Champerty Motion Appeal and Costs at para. 1;
[Tab 3]

F. The Defendant Has Not Proven Impecuniosity or that there is an Access to Justice Issue

25. Mr. Rancourt continues to argue, time and again, that he is impecunious and therefore should be immune from costs awards.

26. In his Cost Decision, Smith J. cited from one of his earlier decisions where he held that he did not have sufficient evidence before him to determine whether Mr. Rancourt was unable to pay legal costs:

Whether he has made himself judgment proof as alleged by Ms. St. Lewis in her submissions by recently transferring his interest in his home to his spouse for \$1.00 is not a reason for not awarding reasonable costs to the successful party. I am also unaware of how successful he has been with his online solicitation of financial support for his legal costs. Mr. Rancourt's alleged inability to pay costs is not a factor given much weight in the circumstances where his own conduct has caused the responding party to incur substantial legal costs to reasonably respond.

Costs Decision of Smith J., at para. 33; [Tab 1]

27. Mr. Rancourt continues to allege impecuniosity without making any effort to prove it. In rejecting Mr. Rancourt's claims of impecuniosity, Smith J. correctly held that "it was important to avoid a situation where a person without means can cause responding parties to incur substantial legal costs without any financial consequences".

Costs Decision of Smith J., at para. 34; [Tab 1]

Myers v. Toronto (Metropolitan) Police Force, [1995] O.J. No. 1321, at paras. 19-22;
[Tab 8]

28. In any event, Mr. Rancourt's alleged impecuniosity has apparently not prevented him from accessing justice, as he has, without success, filed or caused to be filed dozens of motions and appeals in this matter, at all levels of court, including the Supreme Court of Canada.

G. The Quantum Awarded is Fair and Reasonable

29. Mr. Rancourt argued before Smith J., as he has in the present appeal, that the quantum of costs was unfair and unreasonable. In response, Smith J. held that:

- (a) the University and the Plaintiff were entirely successful on Mr. Rancourt's Champerty Motion;
Costs Decision of Smith J. at para. 6; [Tab 1]
- (b) the hourly rates claimed by counsel were reasonable based on counsels' extensive experience and excellent reputation;
Costs Decision of Smith J. at paras. 25-30; [Tab 1]
- (c) Mr. Rancourt was aware of the hourly rates charged by counsel for the Plaintiff and the University as he had been involved in several motions during the past two years in which costs have been awarded against him;
Costs Decision of Smith J. at para. 31; [Tab 1]
- (d) his conduct of filing very lengthy, extensive materials on many issues and contesting every aspect of the litigation caused counsel to spend large amount of time to research and respond;
Costs Decision of Smith J. at paras. 21, 24 and 32; [Tab 1]

- (e) the matter was made factually complex due to the extensive allegations made by Mr. Rancourt against various representatives of the University; the affidavit and motion record filed by Mr. Rancourt contained 1,362 pages; he made reference to 520 pages of transcripts of cross-examination and added 220 pages of affidavits and exhibits to his motion;

Costs Decision of Smith J. at paras. 7-9; [Tab 1]

- (f) the parties attended five case conferences with respect to the Champerty Motion; and

Costs Decision of Smith J. at para. 10; [Tab 1]

- (g) Mr. Rancourt delayed the hearing of the Champerty Motion by causing an adjournment and then sought to cause even further delay when he requested a second adjournment on the day of the re-scheduled motion.

Costs Decision of Smith J. at para. 11; [Tab 1]

- (h) Smith J. wrote in his Costs Decision:

The University submits that what was a relatively straightforward application of the law of champerty and maintenance to the facts became a piece of litigation which took on a life of its own due to Rancourt's conduct of the litigation, which has added immeasurably to the cost and time. I agree with this submission.

Costs Decision of Smith J. at para. 36; [Tab 1]

H. The University is Entitled to Costs

30. Mr. Rancourt argues before this Court, as he argued before Smith J., that the University is not entitled to costs because there was no need for them to intervene and they were not granted leave to receive costs.

31. Smith J. properly rejected Mr. Rancourt's argument, finding that the University was entitled to participate in the motion, had a right to file material and respond to the motion, and, therefore, had a right to recover costs incurred on the motion, pursuant to Rule 57 of the *Rules of Civil Procedure*.

Costs Decision of Smith J., at paras. 17-19; [Tab 1]

32. This Court recently awarded costs to the University when it dismissed Mr. Rancourt's appeal of the Champerty Motion decision.

Court of Appeal Reasons on Champerty Motion Appeal and Costs, para. 4; [Tab 3]

33. The Supreme Court of Canada awarded costs to the University when it dismissed Mr. Rancourt's motion seeking leave to appeal from Annis J.'s decision, which denied leave to appeal from an interlocutory decision of Beaudoin J. Beaudoin J. had dismissed Mr. Rancourt's motion seeking an order requiring the University's witnesses to answer questions refused in their cross-examination on Affidavits.

***St. Lewis v. Rancourt*, 2013 CanLII 40335 (SCC); [Tab 9]**

34. There is no doubt that Mr. Rancourt would have expected to receive costs from the University had the University been unsuccessful in any of the motions or appeals filed or caused to be filed by Mr. Rancourt.

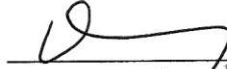
I. Conclusion: There is No Basis on Which to Grant Leave

35. There is no ground, let alone an "obvious ground", upon which to overturn Smith J.'s Costs Decision.

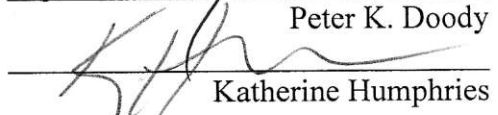
**PART III – STATEMENT OF ADDITIONAL ISSUES, CONCISE
STATEMENT OF LAW AND AUTHORITIES**

36. The University has no additional issues to submit to this Honourable Court.

ALL OF WHICH IS SUBMITTED, this 16th day of December, 2013.



Peter K. Doody



Katherine Humphries

BORDEN LADNER GERVAIS LLP
Counsel for the Respondent,
University of Ottawa

Schedule A – Authorities
[All cases printed on December 12, 2012]

1. *St. Lewis v. Rancourt*, 2013 ONSC 6118 (Costs Decision of Smith J.)
2. *St. Lewis v. Rancourt*, 2013 ONSC 1564 (Reasons from Champerty Motion Decision)
3. *St. Lewis v. Rancourt*, 2013 ONCA 701 (Court of Appeal Reasons on Champerty Motion Appeal and Costs)
4. *McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.*, 2008 ONCA 597
5. *Hill v. The Church of Scientology in Toronto*, [1995] 2 SCR 1130
6. *St. Lewis v. Rancourt*, 2012 ONSC 3320
7. *St. Lewis v. Rancourt*, 2012 ONSC 5998
8. *Myers v. Toronto (Metropolitan) Police Force*, [1995] O.J. No. 1321
9. *St. Lewis v. Rancourt*, 2013 CanLII 40335 (SCC)

Schedule B – Statutes, Regulations and By-laws

1. *Courts of Justice Act*, RSO 1993, c. C.43, ss.131, and 133

Costs

131.(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

Crown costs

(2) In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund. R.S.O. 1990, c. C.43, s. 131 (2); 1994, c. 12, s. 45.

Leave to Appeal Required

133. No appeal lies without leave of the court to which the appeal is to be taken,

- (a) from an order made with the consent of the parties; or
- (b) where the appeal is only as to costs that are in the discretion of the court that made the order for costs. R.S.O. 1990, c. C.43, s. 133.

2. *Rules of Civil Procedure*, Rule 57.01(1)

57.01(1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

- (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- (a) the amount claimed and the amount recovered in the proceeding;
- (b) the apportionment of liability;
- (c) the complexity of the proceeding;
- (d) the importance of the issues;
- (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (f) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or

- (ii) taken through negligence, mistake or excessive caution;
- (g) a party's denial of or refusal to admit anything that should have been admitted;
- (h) whether it is appropriate to award any costs or more than one set of costs where a party,
 - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
 - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
- (i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

JOANNE ST. LEWIS
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Defendant (Moving Party)

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UNIVERSITY OF OTTAWA
Rule 37 Affected Party (Respondent)

Court File No. C56905

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Proceeding Commenced at OTTAWA

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[Rancourt's Motion for Leave to Appeal]

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